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April 22, 2008

### **AGENDA ITEM 3**

**TO: MEMBERS OF THE BENEFITS AND PROGRAM ADMINISTRATION COMMITTEE**

**I. SUBJECT:** Assembly Bill 1936 (Emmerson)—As Introduced  
February 12, 2008

Nonprofit Mutual Water Companies

Sponsor: San Antonio Water Company

**II. PROGRAM:** Legislation

**III. RECOMMENDATION:** Neutral

This bill would permit a nonprofit mutual water company that meets certain criteria to enter into a contract as a “public agency” with CalPERS upon obtaining a written advisory opinion from the Department of Labor.

**IV. ANALYSIS:**

This bill would define a nonprofit mutual water company that meets certain criteria as a “public agency” only for the purposes of contracting with CalPERS for retirement and health coverage. The status of this entity as a “public agency” would be conditioned upon obtaining a written advisory opinion from the United States Department of Labor stating that the organization is an agency or instrumentality of state government or a political subdivision thereof. The intent of the bill is to qualify the San Antonio Water Company as a public agency for the purposes of contracting with CalPERS, but only after receiving a written advisory opinion from the Department of Labor.

## **Background**

### *Public Agency Determination Process*

Public agencies are authorized to contract with CalPERS for retirement and health coverage. A public agency is generally defined as a city, county, district or other local authority, or public body of or within the state. In addition, there are other entities that have been expressly included in the “public agency” definition by the Legislature for purposes of contracting with CalPERS.

In order to enter into a contract, the entity must submit documents of origin (such as by-laws) so that a determination can be made that the entity meets the definition of “public agency.” CalPERS staff determines, on a case-by-case basis, whether an entity is a public agency as defined in statute.

As part of the determination process, any agency that qualifies under certain special exceptions established by the Legislature must first obtain a written advisory opinion from the Department of Labor stating that the organization is an agency or instrumentality of the state or a political subdivision thereof. This requirement was sponsored by CalPERS and first became effective for public agency requests received on or after January 1, 1999.

In 1998, CalPERS sponsored AB 1166 (Chapter 678, 1999) to add the requirement that a public agency obtain an advisory opinion from the United States Department of Labor to address the implications of a non-governmental agency affecting CalPERS’ governmental plan status, thereby making it subject to the Employee Retirement Income Security Act of 1975 (ERISA).

In addition, the CalPERS Omnibus Technical Bill of 2001, AB 1963 (Chapter 793, 2001), made a minor amendment to the law regarding the requirements of the advisory opinion. This amendment required the inclusion of specific language in the advisory letter that stated the organization is an agency or instrumentality of the state government or a political subdivision thereof, rather than state that the entity’s participation does not affect CalPERS governmental plan status.

### *San Antonio Water Company (SAWCo)*

The San Antonio Water Company is a historically established mutual water company incorporated October 25, 1882. SAWCo is a nonprofit mutual water company, exempt from taxation under Section 501 (c) (12) of the Internal Revenue Code. Its shareholders are its customers in which 68 percent of the shares are owned by the City of Upland and another four percent are owned by neighboring cities, making total public ownership 72 percent.

### **Proposed Changes**

This proposal would add a nonprofit mutual water company that meets certain criteria to the definition of a “public agency”, but only for the purposes of contracting with CalPERS for retirement and health coverage.

This definition would apply to a nonprofit mutual water company operating pursuant to Chapter 1 of Part 7 of Division 3 of Title 1 of the Corporations Code (commencing with section 14300), upon obtaining a written advisory opinion from the United States Department of Labor, if both of the following requirements are satisfied:

- More than 50 percent of the company’s shares are owned by a municipality.
- The governing body of the company is a local public agency, as defined in section 6252, and a legislative body as defined in section 54952.

A company meeting these requirements shall be deemed a “public agency” only for the purposes of this part and only with respect to the employees of the agency.

### **Legislative History**

- 2006 Chapter 307 (SB 1273, Soto) – Defined as a “public agency” a private nonprofit area agency on aging for the purposes of contracting with CalPERS for retirement and health coverage. *CalPERS Position: Neutral.*
- 2001 Chapter 793 (AB 1683 Omnibus bill, Assembly Committee on Public Employees, Retirement and Social Security) – Amended various sections of the Public Employees’ Retirement Law regarding specific language of the advisory letter including that the organization is an agency or instrumentality of the state government or a political subdivision, rather than state that the entity’s participation does not affect CalPERS governmental plan status. *CalPERS’ position: Sponsor.*
- 2000 Chapter 357 (AB 2285, Florez) - Authorized certain public or private nonprofit corporations that operate a rehabilitation facility for the developmentally disabled to contract with CalPERS for retirement or health coverage, provided that a written advisory opinion is obtained from the United States Department of Labor stating that the rehabilitation facility’s participation does not effect the status of CalPERS as a government plan under federal law. *CalPERS’ position: Neutral.*
- 1998 Chapter 678 (AB 1166, House) – Required any public agency applying to participate in CalPERS on or after January 1, 1999 to submit a specified opinion from the United States Department of Labor and made other technical and minor policy changes to the Public Employees’ Retirement Law. *CalPERS’ position: Sponsor.*

- 1997 Chapter 304 (AB 658, Scott) - Defined the Western Association of Schools and Colleges as a contracting agency. *CalPERS' position: Neutral.*
- 1996 Chapter 961 (AB 3133, Firestone) – Defined an auxiliary organization of the California Student Aid Commission as a public agency for purposes of obtaining retirement coverage through a contract with CalPERS. *CalPERS' position: Watch.*
- AB 2675 (Burton) - Would have defined the Protection and Advocacy Agency as a public agency for health coverage purposes. The bill was vetoed by the Governor. *CalPERS' position: Neutral.*
- 1991 Chapter 404 (SB 137, Thompson) - Defined county fair auxiliary organizations as public agencies. *CalPERS' position: Support.*
- Chapter 414 (AB 1203, Woodruff) - Amended the definition of “public agency” to include auxiliary organizations of the California State University or the California Community Colleges. *CalPERS' position: Support, if amended.*
- 1989 AB 4233 (Hughes) would have defined community action agencies as public agencies. The bill was vetoed. The veto message indicates that the Governor felt it was inappropriate to expand the purview of CalPERS to include non-governmental agencies. *CalPERS' position: Neutral*

## **Issues**

### **1. Arguments by Those in Support**

According to SAWCo, this bill is an employee attraction and retention tool. The water company must compete with area water agencies for talented employees and would like to offer them membership in CalPERS as an incentive.

*Organizations in Support: San Antonio Water Company (Sponsor)*

### **2. Arguments by Those in Opposition**

There is no known opposition at this time.

### **3. Nonprofit Mutual Corporations as Public Agencies**

Current law authorizes a “public agency” to contract with CalPERS for retirement or health benefits. Within that definition of “public agency,” current law provides that a nonprofit corporation whose membership is confined to public agencies qualifies as a public agency. CalPERS has consistently found that nonprofit corporations that do not meet the definitional requirements of section 20056 (definition of a public agency) or 20057 (legislative exemptions to the definition) do not qualify as a public agency and therefore are not eligible to contract with CalPERS for retirement benefits. SAWCo is a nonprofit corporation whose

membership is not confined to public agencies, and therefore does not meet the current definitions of a “public agency.”

4. Other Public Agency Considerations Related to SAWCo

In January 2005, SAWCo amended its by-laws to open the board meetings to the public under the Ralph M. Brown Act and to open its records pursuant to the Public Records Act as a result of an unpublished appellate court ruling by the Fourth District Appellate Court titled California First Amendment Coalition et al. v. San Antonio Water Company. The Court ruled that (i) SAWCo’s Board is a legislative body of a local agency within the meaning of Section 54952 of the Government Code and (ii) that the SAWCo Board was a local public agency within the meaning of Government Code section 6252. (This court decision was only focused on definitions contained in and limited as used in the Public Records Act and Ralph M. Brown Act and does not authorize SAWCo to contract with CalPERS.)

The bill will have a narrow application since it would require, in addition to obtaining a written advisory opinion from the U. S. Department of Labor, that (i) more than 50 percent of the company's shares be owned by a municipality and (ii) that the governing body of the company is a local public agency as defined and a legislative body, as defined, before a mutual water company can qualify as a public agency eligible to contract with CalPERS.

5. Legislative Policy Standards

CalPERS’ Legislative Policy Standards suggest a Neutral position for proposals which do not significantly affect the benefit interests of our stakeholders and which do not significantly impact CalPERS’ benefits or the administration of the system.

**V. STRATEGIC PLAN:**

This item is not a specific product of the Annual or Strategic Plans, but is a part of the regular and ongoing workload of the Office of Governmental Affairs.

**VI. RESULTS/COSTS:**

This bill would define a nonprofit mutual water company that meets certain criteria as a “public agency” only for the purposes of contracting with CalPERS for retirement and health coverage.

**Program Cost**

This bill will not create additional program costs.

**Administrative Costs**

This bill will have minimal administrative costs.

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